CRIMINAL LAW ISSUES

NICHOLSON v. STATE, No. 48S00-0109-CR-434, ___ N.E.2d ___ (Ind. May 24, 2002).
SHEPARD, C. J.

B. Torture Aggravator. The second aggravator was an allegation that Nicholson tortured the victim while she was alive. See Ind. Code Ann. § 35-50-2-9(b)(11)(C) (West 1998). This case is our first encounter with torture as an aggravating circumstance.

The statute does not define "torture." Webster's Dictionary defines it as "the infliction of intense pain (as from burning, crushing, wounding) to punish or coerce someone; torment or agony induced to penalize religious or political dissent or nonconformity; to extort a confession or a money contribution, or to give sadistic pleasure to the torturer." Webster's Third New International Dictionary 2414 (1993).

The State argues that the torture aggravator is satisfied by proof of infliction of severe physical or mental pain. This alone surely cannot be sufficient. If such were the case, any stabbing or shooting victim would also be tortured. The other aggravators listed in Ind. Code Ann. § 35-50-2-9(b)(11), "burned" and "mutilated," further suggest that the legislature intended something more than simply the infliction of severe physical or mental pain to satisfy the torture aggravator.

We conclude that the torture aggravator requires something more: an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer's sadistic indulgence.

Put another way, torture is the gratuitous infliction of substantial pain or suffering in excess of that associated with the commission of the charged crime. Although the victim here undoubtedly experienced extreme suffering, the evidence does not show that the events fit the definition of torture.

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BOEHM, DICKSON RUCKER, and SULLIVAN, JJ., concurred.

RINGHAM v. STATE, No. 49S02-0112-CR-642, ___ N.E.2d ___ (Ind. May 29, 2002).
BOEHM, J.

On April 17, 2000, Judge Tanya Walton Pratt handled some preliminary matters prior to the commencement of Ringham's trial. A brief recess was ordered, and when the court reconvened Judge Pratt was occupied by administrative duties related to an upcoming death penalty trial. Judge Pratt executed an "Appointment of Attorney as Judge Pro Tempore" form to permit Master Commissioner Alex Murphy to preside over the trial. The papers appointing Judge Murphy were "placed" in the Marion County Clerk's order book, but were not included in Ringham's court file. [Footnote omitted.] The entry in the Chronological Case Summary ("CCS") for April 17 described the "JUDGE" as "44214 PRATT TANYA W" and the entry for April 18

described the "JUDGE" as "49420 MURPHY ALEX TYPE: Pro Tem."

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. . . [T]he Court of Appeals reversed his conviction, holding that Judge Murphy had improperly presided over the trial. Ringham v. State, 753 N.E.2d 29, 34 (Ind. Ct. App. 2001). The court held that because Judge Murphy stated he was sitting as "commissioner"—rather than as judge pro tempore—and because the papers appointing him were not notarized, file stamped and recorded in the trial court's CCS for April 17, on that date Judge Murphy was presiding not as a properly appointed judge pro tempore, but in the capacity of Master Commissioner. [Citation omitted.] Accordingly, when Ringham objected, Judge Murphy was required by Indiana Code sections 33-5.1-2-11(e) and 27(d) to transfer the proceedings back to Judge Pratt. Id. at 34-35. . . .

. . . .

Indiana Code section 33-5.1-2-27(d) provides: "A party to a superior court proceeding that has been assigned to a magistrate . . . may request that an elected judge . . . preside over the proceeding instead of the magistrate . . . . Upon a request made . . . by either party, the magistrate . . . shall transfer the proceeding back to the superior court judge." If Judge Murphy was sitting as a commissioner, this section required him to transfer the proceedings back to Judge Pratt when Ringham objected to his presiding. In the hearing on remand Judge Pratt entered findings of fact, including a finding that Appointment of Attorney as Judge Pro Tempore papers were executed and placed, "[a]s done in the regular course of business," in the Marion County Clerk's order book. The court concluded as a matter of law that although the deputy clerk failed to include these papers in Ringham's record of proceedings, file stamp them, and record them in the trial court's CCS on April 17, the papers were nevertheless "properly executed and were intended to be in defendant's record of proceedings," and that accordingly Judge Murphy was validly appointed. . . .

. . .Although we agree that notarizing, file stamping, and contemporaneously noting appointment papers in the CCS is desirable and would minimize the risk of the type of confusion that arose in this case, we do not believe reversible error occurred by reason of these irregularities . . . Judge Pratt found that the appointment was in fact made on April 17, and that finding is not clearly erroneous. Indeed, it seems clearly correct.

. . .[A]lthough Judge Murphy referred to himself as "commissioner" when he explained Judge Pratt's absence to the parties, a judge's status is determined by an examination of the record, not the judge's self-description. Dearman v. State, 632 N.E.2d 1156, 1159 (Ind. Ct. App. 1994), trans. denied. As explained above, the trial court record, as supplemented, shows that Judge Murphy was validly appointed judge pro tempore.

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

CIVIL LAW ISSUES

STEGEMOLLER v. ACANDS, INC., No. 49S02-0111-CV-593, ___ N.E.2d ___ (Ind. May 17, 2002).

SHEPARD, C. J.

Ramona Stegemoller allegedly contracted a disease as a result of contact with asbestos fibers brought home on the person and clothing of her husband Lee, a union insulator. The trial court dismissed the Stegemollers' suit on the basis that Ramona lacked standing under Indiana's Product Liability Act. The Court of Appeals affirmed. Stegemoller v. ACandS, Inc., 749 N.E.2d 1216, 1220 (Ind. Ct. App. 2001). We granted transfer, 761 N.E.2d 423 (Ind. 2001), and now hold that she has standing as a bystander under the Act. [Footnote omitted.]

. . . .

. . . For purposes of the Act, "consumer" includes "any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use." [Citation omitted.] . . .

. . . .

The manufacturers and other defendants would have us hold that Mrs. Stegemoller lacks standing under the Act and cannot otherwise maintain a negligence claim because the Act "provides the sole and exclusive remedy for personal injuries allegedly caused by a product." [Citation to Brief omitted.] They say the claim falls outside the Act because Mrs. Stegemoller was not in the vicinity of the product. They reason that the product at issue is insulation material that contains asbestos, not residue such as fibers from that material, and that Mrs. Stegemoller was not in the vicinity of the industrial jobsite where the insulation material was used.

This is too narrow a view. The normal, expected use of asbestos products entails contact with its migrating and potentially harmful residue. We conclude that divorcing the underlying product from fibers or other residue it may discharge is not consistent with the Act.

. . . .

BOEHM, DICKSON RUCKER, and SULLIVAN, JJ., concurred.

SOUTH GIBSON SCH. BD. v. SOLLMAN, No. 26S01-0009-CV-530, ___ N.E.2d ___ (Ind. May 24, 2002).

RUCKER, J.

Student discipline rules for the South Gibson School Corporation proscribe certain conduct including the possession of marijuana. [Footnote omitted.] For several years there has been in place a zero-tolerance policy concerning drugs, the application of which results in the "maximum expulsion" allowed by law. [Citation to Record omitted.] . . .

. . . .

On December 17, 1998, a drug-sniffing dog found a small amount of marijuana in Sollman's truck that was parked in a lot on Gibson Southern High School property. There were three days left in the fall semester. . .

. . . .

. . . As for the denial of grades and credits, finding the School Board's action arbitrary and capricious, the trial court ordered that Sollman was to be given zeros for all fall semester course work that he missed after the expulsion but was then to be given credit for those courses in which he had a passing grade after taking the zeros into account. . . .

. . . .

The Court of Appeals agreed with the trial court that Sollman could not be expelled beyond the last day of the spring semester. According to the Court of Appeals, the statute defining "school year," Indiana Code section 20-10.1-2-1(a), and the statute limiting the expulsion period for misconduct in the fall semester to the "remainder of the school year," Indiana Code section 20-8.1-5.1-14(a), were not intended to include summer school within the period of expulsion that may be imposed for conduct occurring in the fall semester. Sollman, 728 N.E.2d at 918. We agree and summarily affirm the Court of Appeals' opinion on this issue. See Ind. Appellate Rule 58(A)(2). We disagree, however, that the School Board acted arbitrarily and capriciously in denying Sollman credit for the fall semester.

. . . .

We understand the sentiment implicit in the trial court's order and expressed by some commentators concerning the harshness of so-called zero-tolerance policies. [Footnote omitted.] . . . The question in this case is whether the decision of the School Board was arbitrary and capricious.

. . . In this case, Sollman was not allowed to complete required examinations "in order to

receive credit" for the courses he had taken during the semester. He was thus expelled as a disciplinary sanction within the meaning of the statute. And although we do not agree with the view that the statute mandates a loss of credit upon expulsion, [footnote omitted] we do acknowledge that the School Board has the discretion to impose such a sanction.

In order to promote student conduct which conforms with an orderly and effective educational system, a school board could understandably reach the conclusion that the deterrent of expulsion, uncoupled from a loss of credit, may not be a deterrent sufficient enough for a student to avoid being expelled. If a student knows for example that the ultimate consequence of violating school policy is expulsion only, then the student may assume the risk of getting expelled where he has already accumulated sufficient grades to pass the semester. In that instance, the disciplinary sanction for misbehavior is appreciably lessened, leaving only a penalty students might consider an incentive to misbehave. . . .

. . . As applied here, we cannot say there was "no reasonable basis" for the School Board's action. Ind. Civil Rights Comm'n, 668 N.E.2d at 1221. Accordingly, Sollman failed to carry his burden of demonstrating that the School Board acted arbitrarily and capriciously in depriving him of his fall semester credits. On this issue, the judgment of the trial court is reversed.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and SULLIVAN, JJ., concurred.

OLGESKI v. FRITZ, No. 75S05-0205-CV-296, ___ N.E.2d ___ (Ind. May 28, 2002).

BOEHM, J.

We hold that claims made by a patient's "representative" under the Medical Malpractice Act survive the death of the representative and pass to the representative's estate. Derivative claims for medical malpractice such as a claim by a spouse for loss of consortium generally survive the death of the claimant under the Survival Statute.

. . . .

. . . Dorothy Vetter, Lawrence's wife, filed a claim with the Department of Insurance seeking damages from the hospital and the physicians for lost "financial support, love, affection, kindness, attention and companionship" as well as reasonable funeral, burial and medical expenses. All defendants are "providers" of health care under the Indiana Medical Malpractice Act.

. . . .

Dorothy died before the claim review process was completed. Nadine Goleski, the couple's daughter, was appointed personal representative of Dorothy's estate and filed an amended malpractice claim, contending that Dorothy's claim survived Dorothy's death and passed to Dorothy's estate. . . ... The trial court granted summary judgment for the defendants, holding that Goleski could not maintain an action under any of three theories. Goleski had no cause under the Wrongful Death Act because she was not the personal representative of Lawrence's estate. She could not claim under the Medical Malpractice Act because she was not Lawrence's "representative" as that term appears in that statute. And the Survival Statute did not help Goleski because she was not the personal representative of Lawrence's estate and was not alleging that something other than the defendants' negligence caused Lawrence's death. The Court of Appeals affirmed in an unpublished memorandum opinion. . . .

We agree Goleski cannot maintain an action under the Wrongful Death Act. Indiana Code section 34-23-1-1 provides that when a person's death is caused by the negligence of another, and the deceased could have maintained an action had he or she survived, "the personal representative" of the deceased may bring an action within two years. Ind. Code § 34-23-1-1 (1998). Case law has consistently interpreted the statute to mean that only a personal

representative appointed within two years of the decedent's death may file the action. [Citations omitted.] Here, neither Goleski nor anyone else was appointed personal representative of Lawrence's estate. . . .

. . . .

The Medical Malpractice Act allows a "patient or the representative of a patient" to bring a malpractice claim "for bodily injury or death." Ind. Code § 34-18-8-1 (1998). A "patient" is "an individual who receives or should have received health care . . . and includes a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice." I.C. § 34-18-2-22. "Derivative" claims "include the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of the patient," and include "claims for loss of services, loss of consortium, expenses, and other similar claims." Id. Accordingly, under the terms of the Medical Malpractice Act, before Dorothy died she was a "patient" with "derivative" claims insofar as she asserted claims for lost financial support, love, affection, kindness, attention, companionship, and reasonable funeral and burial expenses. [Footnote omitted.] As the wife of Lawrence, she clearly was a "relative." She therefore met the statutory requirement to bring these claims as a "patient" and was entitled to assert "derivative" claims for these items under the Medical Malpractice Act.

The Survival Statute provides that if an individual with a cause of action dies, most causes of action survive and may be brought by the "representative" of the deceased. I.C. § 34-9-3-1(a). When Dorothy died she became the "deceased" under the Survival Statute, and when Goleski was appointed the personal representative of Dorothy's estate, Goleski became the "representative" under this statute. [Footnote omitted.] The Survival Statute does not preserve causes of action for libel, slander, malicious prosecution, false imprisonment, invasion of privacy, or personal injuries to the deceased. I.C. § 34-9-3-1(a). Only if Goleski's claims are for "personal injuries to the deceased" would they fail to survive Dorothy's death. They are not within that term. To the extent Goleski asserts claims for "personal injuries" to Lawrence, they survive Dorothy's death because Dorothy, not Lawrence, is "the deceased." Other claims are for loss of consortium and Lawrence's funeral expenses. Even if these are claims for "personal injury" to Dorothy, [footnote omitted] the Survival Statute allows Dorothy's representative to sue for personal injuries to the deceased (Dorothy) if Dorothy "subsequently dies from causes other than those personal injuries." I.C. § 34-9-3-4(a). Dorothy plainly died from causes other than her loss of consortium and her incurring Lawrence's funeral expenses. As a result, to the extent the claims are for personal injuries, they remain alive because Dorothy did not die as a result of those injuries. Finally, to the extent any of the claims are not claims for "personal injuries" they are preserved by the Survival Statute, which states that all claims other than those listed in it survive.

. . . .

As noted above, the Medical Malpractice Act allows a "patient or the representative of a patient" to bring a malpractice claim "for bodily injury or death." Ind. Code § 34-18-8-1 (1998). The inclusion of the term "death" plainly implies that the claim survives the death of Lawrence, the person treated by the health care providers. A "representative" is "the spouse, parent, guardian, trustee, attorney, or other legal agent of the patient." Id. at § 34-18-2-25. Unlike the Wrongful Death Act, however, the Medical Malpractice Act does not require that the "representative" be the legally appointed personal representative of the patient. [Citation omitted.] Accordingly, Dorothy's claim for Lawrence's medical expenses was asserted as a "representative" as that term is used in the Medical Malpractice Act. As Lawrence's spouse, Dorothy clearly met the statutory requirements to bring the claim as his "representative." The Survival Statute preserves this claim for Dorothy's estate after her death because it is neither a claim for personal injuries to

Dorothy, nor a claim for libel, slander, malicious prosecution, false imprisonment, or invasion of privacy. Accordingly, it survived Dorothy's death and passed to her estate.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred

DVORAK v. CITY OF BLOOMINGTON, No. 53A01-0105-CV-188, ___ N.E.2d ___ (Ind. Ct. App. May 17, 2002).

KIRSCH, J.

Peter Dvorak is the owner of a residential property in Bloomington. On April 23, 1996, the City filed a complaint against Dvorak, claiming that he violated a zoning ordinance in the Bloomington Municipal Code (Ordinance) by permitting the property to be occupied by more than the designated number of adults who were unrelated by blood, marriage, or adoption. [Footnote omitted.] The City alleged that the remaining five Appellants violated the Ordinance by occupying the residence.

. . . .

. . . [W]e hold that the acts of a city through its municipal zoning authority are state action subject to the Equal Privileges and Immunities Clause. . . .

. . . .

Courts in other jurisdictions have considered whether similar ordinances violate state constitutional due process provisions and have held that the legislation is not reasonably related to the ends it is designed to achieve, including density control, alleviation of traffic congestion, and preservation of neighborhoods.

. . . .

At the hearing, Don Hastings, the City's Planning Director, testified that the purpose of the Ordinance was the protection of core neighborhoods through the reduction of adult population density and the reduction of external impacts such as traffic, trash generation, noise, and inappropriate parking of vehicles. Hastings stated that the basis for his conclusion that regulating unrelated adults would promote these values was based on "professional literature" and "planning premises" that unrelated adults cause greater external impacts than related adults through more independent lifestyles. [Citation to Transcript omitted.] He explained, however, that these sources were not "expert studies." [Citation to Transcript omitted.] He further noted anecdotal evidence from a non-random survey of students at Indiana University that showed a higher rate of car travel than in years past. Hastings also testified, however, that scenarios existed under which a household might change from "related" to "unrelated" status with no resulting change in external impacts. He had no report or study to support his statement that unrelated adults cause greater impacts; instead he relied on a "community plan that was developed after years worth of intensive community input." [Citation to Transcript omitted.] He also admitted that so long as the household members are related, there was no limit to the number of people that could live in a single house.

The only evidence before us shows that the Ordinance is based on mere planning premises without any documented support in professional literature. There is no showing that the classification created by the Ordinance was reasonable or substantial. Rather, the same impacts could be caused regardless of the relational status of the household members. Thus, the bases for the classification offered by the City were pretextual and were not reasonably relied upon to create a scheme in which one class of citizens is burdened. Accordingly, we hold that the Ordinance violates the Equal Privileges and Immunities Clause of the Indiana constitution.

. . . .

ROBB and SULLIVAN, JJ., concurred.

GERALD v. TURNOCK PLUMBING, HEATING, AND COOLING, LLC., No. 71A04-0106-CV-245, ___ N.E.2d ___ (Ind. Ct. App. May 20, 2002).

VAIDIK, J.

Timothy Gerald, Sheryl Gerald, and James Gerald by and through his guardian Bill Moen (the Geralds) appeal the trial court's order disqualifying the law firm of Anderson, Agostino & Keller, P.C. (AAK) from representing them in this case. The Geralds argue that the trial court erred in disqualifying AAK because the two AAK attorneys who were previously employed by Hunt Suedhoff Kalamaros LLP (Hunt Suedhoff), the opposing law firm in this case, do not remember any of their work with Hunt Suedhoff concerning the Geralds' claims. The Geralds also argue that the trial court abused its discretion in disqualifying AAK because the firm instituted sufficient interoffice procedures to insure that confidential information was not passed between the two tainted lawyers and the rest of the law firm. Because we find that the subject matter between the present and prior representation is substantially related and because timely screening mechanisms were not placed around the two lawyers, we affirm. [Footnote omitted.]

. . . .

. . . The Indiana Code of Professional Responsibility required a lawyer to avoid even the appearance of professional impropriety and that in certain situations the disqualification of one lawyer within a law firm meant that all members of the firm were also disqualified. [Citation omitted.] . . . However, the Indiana Rules of Professional Conduct provide that the rule of imputed disqualification should not be so rigid. Instead, the Comment to Professional Conduct Rule 1.10 identifies certain considerations that should be weighed in the administration of this rule:

> First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association.

[Citation omitted.] . . .

. . . [T]his case presents our first opportunity under the Indiana Rules of Professional Conduct to address the rule of imputed disqualification as it applies to lawyers who move between firms, . .. Because we find that the analysis employed by the Seventh Circuit for imputed disqualification cases embraces the principles espoused in our Rules of Professional Conduct, we adopt the test employed by the Seventh Circuit.

In determining whether an attorney should be disqualified, the Seventh Circuit has utilized a three-step test. This test employs a system of presumptions that must be rebutted by the law firm seeking to continue representation of a client when a new lawyer joins the firm after working in a firm that represented a client in a matter substantially related to the current representation, and the clients have adverse positions. Under this approach:

First, we must determine whether a substantial relationship exists between the subject matter of the prior and present representations. If we conclude a substantial relationship does exist, we must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. If we conclude this presumption has not been rebutted, we must then determine whether the presumption of shared confidences has been rebutted with

respect to the present representation. Failure to rebut this presumption would also make disqualification proper.
[Citations omitted.]

. . . Before Hunt Suedhoff formally represented Turnock against the Geralds' claims, both Agostino and Parish worked for Hunt Suedhoff while the firm provided Cincinnati with answers on coverage questions stemming from the Geralds' claims against Turnock. Then, as attorneys for AAK, Agostino and Parish were employed by the law firm that was prosecuting the Geralds' claims against Turnock. While Hunt Suedhoff's original client was Cincinnati and not Turnock, we find that in this case the insurance company's interests were intertwined with Turnock's and that the Geralds' claims were materially adverse to both clients. In addition, we find that even if the issues in the prior and present representations are not identical, they are so closely interwoven as to constitute substantially related subject matter for purposes of this test.

For the second step of the test, we analyze Agostino and Parish's representation at Hunt Suedhoff. Having found that there is a substantial relationship in the prior and present representations, there is a rebuttable presumption that the attorneys received confidential information during their prior representation. [Citation omitted.] . . . The evidence shows that not only were Agostino and Parish employed at Hunt Suedhoff during the relevant period of time, but both attorneys were also assigned to monitor the file relating to the Geralds' claims. . . . Thus, we find that the Geralds have failed to rebut the presumption that Agostino and Parish received confidential information relating to the Geralds' claim during their employment with Hunt Suedhoff.

Therefore, we turn to the final step of the three-part test. For the last step of the test, there is a rebuttable presumption that the knowledge possessed by one attorney in a law firm is shared with the other attorneys in the firm. [Citation omitted.] This presumption can be rebutted by a demonstration that specific institutional mechanisms (e.g., Fire Walls) were implemented to effectively insulate against any flow of confidential information from the infected attorney to any other member of his or her present firm. [Citations omitted.] Types of Fire Walls that have previously been found to be sufficient are:

> (1) instructions, given to all members of the new firm, of the attorney's recusal and of the ban on exchange of information; (2) prohibited access to the files and other information on the case; (3) locked case files with keys distributed to a select few; (4) secret codes necessary to access pertinent information on electronic hardware; and (5) prohibited sharing in the fees derived from such litigation.

[Citation omitted.] . . . [T]he overriding consideration in determining the effectiveness of a Fire Wall is that the "screening arrangement was set up at the time when the potentially disqualifying event occurred, either when the attorney first joined the firm or when the firm accepted a case presenting an ethical problem." [Citations omitted.]

In this case, AAK circulated a Memo on December 22, 2000, that prevented Agostino and Parish from being assigned any work on the *Gerald v. Turnock* matter*,* prohibited Agostino and Parish from revealing information about the case to anyone associated with AAK, banned the rest of the firm from engaging in discussions with Agostino and Parish concerning the matter, and restricted access to files and documents on the matter to the attorneys in the firm who were working on the case. [Citation to Brief omitted.] While we have some reservations about the effectiveness of the screening measures instituted by AAK in this case based on the small size of the firm and the fact that Agostino is a partner and would receive a portion of the fees, what we find truly damaging to AAK's claim that its screening mechanisms were effective

is the timing of their implementation.

After Agostino left Hunt Suedhoff, he became a partner at AAK on April 17, 2000. On July 21, 2000, Michael Anderson of AAK entered his appearance in this case on behalf of the Geralds. Therefore, the potentially disqualifying event that should have triggered the implementation of the screening measures occurred either on July 21, 2000, or in the days immediately proceeding, when AAK accepted the Geralds' case. For the Fire Walls implemented by AAK to be successful, they should have been erected around Agostino when the firm accepted the case, not five months later. . . .

Although we note that Agostino and Parish state in their affidavits that they did not reveal any information to the other lawyers at AAK about the matter and that they had in fact forgotten any particular facts about the case, the delay in implementing any type of screening mechanism negated its effectiveness. . . . In this case, AAK's Fire Walls were simply instituted too late to be effective, even though there is no indication that information was actually shared between the firm's attorneys. Therefore, we find that the trial court did not abuse its discretion when it disqualified AAK from representing the Geralds. [Footnote omitted.]

. . . .

BARNES and FRIEDLANDER, JJ., concurred.

LAE v. HOUSEHOLDER, No. 02A05-0112-CV-549, ___ N.E.2d ___ (Ind. Ct. App. May 20, 2002).

ROBB, J.

The obligations imposed by the Security Deposits statute are limited by the phrase "within forty-five days after the termination" of the lease. See Ind. Code §§ 32-7-5-12, -14. As Judge Najam pointed out in Raider, the forty-five day notice requirement serves "[t]he goals of timely and documented notice of a claim against a security deposit" by protecting tenants from unreasonable delays by their landlords in resolving claims against their security deposits and requiring specific justification for any deduction from the deposit. Raider, 613 N.E.2d at 873. As Judge Najam also noted in Raider, those goals "cannot be achieved . . . when the landlord does not possess the tenant's mailing address in order to deliver the required notice." Id. Although the statute is primarily for the benefit of the tenant, the statute does place the initial burden on the tenant to supply a forwarding address to the landlord. We believe it is also appropriate to place the burden on the tenant to do so in a timely fashion. It would not serve the goals of the statute to allow the tenant to wait months before providing a forwarding address. Our legislature has determined that forty-five days is a reasonable time. If the tenant wishes to have any or all of his security deposit returned within a reasonable time, he must bear responsibility for making sure that the landlord has his forwarding address within that period. Therefore, consistent both with the statute and our opinion in Raider, we hold that the tenant must supply a forwarding address to the landlord within forty-five days of termination of the lease, and the landlord's forty-five day period in which to provide the written itemization is tolled until the tenant meets that obligation. If the tenant does not supply a forwarding address within forty-five days after termination of the lease, the landlord's forty-five day notice period never begins to run, and the landlord cannot violate the terms of the Security Deposits statute or waive his claim to deduct damages from the security deposit by failing to provide the written itemization.

. . . .

BAILEY and NAJAM, JJ., concurred.

JUVENILE LAW ISSUES

FAMILY AND SOC. SERV. ADMIN. v. SCHLUTTENHOFER, No. 91S02-0111-CV-594, ___

N.E.2d ___ (Ind. May 23, 2002).

BOEHM, J.

Schluttenhofer suffered severe injuries that resulted in an amputation above his right knee. Schluttenhofer filed suit against Snodgrass, Budreau, and three other defendants associated with Budreau. In the meantime, Schluttenhofer received $63,245.24 in Medicaid payments from the Indiana Family and Social Services Administration ("FSSA"). FSSA filed a Medicaid lien in that amount pursuant to Indiana Code sections 12-15-8-1 and -2. [Footnote omitted.] Schluttenhofer also received $10,000 from State Farm Mutual Insurance Company for medical payments under the policy covering his employer's vehicle. The only issue is the treatment of this last $10,000 under the lien reduction statute.

Before trial, Schluttenhofer settled with all of the defendants for a total of $325,000. [Footnote omitted.] Schluttenhofer then filed a petition for reduction of the FSSA lien. Schluttenhofer contended, and FSSA does not dispute, that he settled his case for ten percent of his damages. Because his recovery was diminished by ninety percent, Schluttenhofer contended that the lien reduction statute required that FSSA's Medicaid lien be reduced by ninety percent as well. . . . The trial court ruled, after a hearing on the merits, that a ninety percent reduction of the FSSA lien was warranted. The Court of Appeals affirmed. FSSA v. Schluttenhofer, 750 N.E.2d 429 (Ind. Ct. App. 2001).

. . . .

. . . FSSA contends that there should be no reduction of the $10,000 paid by State Farm. The lien reduction statute states:

> If a subrogation claim or other lien or claim that arose out of the payment of medical expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished:
>
> (1) by comparative fault; or
>
> (2) by reason of the uncollectibility of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause;
>
> the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished. The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses.

Ind. Code § 34-51-2-19 (1998). FSSA contends that the State Farm payment must be considered independently of the settlement payments for purposes of determining whether that amount was diminished by comparative fault or by reason of uncollectibility. FSSA reasons that the medical payments claim under Schluttenhofer's employer's policy, viewed separately, was not diminished by either comparative fault or uncollectibility, and no lien reduction should apply. Schluttenhofer responds that the statute refers to a claimant's recovery from all sources. He contends that the $10,000 from State Farm is to be aggregated with the $325,000 recovered from the defendants, resulting in a diminished total "claimant's recovery" of $335,000, and a proportional reduction of the lien. The Court of Appeals agreed with Schluttenhofer. We do not.

In a frequently encountered situation, the medical payments insurer is the party asserting the lien, which is prorated down if the injured party's liability claim against a third party is not fully paid. Here, however, the lien is against the payment from the medical payments insurer. Medicaid is a taxpayer supported program designed to fund medical expenses for those who cannot afford care. As a part of that program, the lien statute is designed to provide for the recovery of any payments that may later be reimbursed from another source. The net effect of Schluttenhofer's contention is to divert some of those funds from reimbursement of medical expenses to compensation for personal injuries. We do not believe the statute

contemplates that result, and its provision that a "claim" must be reduced in order for a lien to be reduced supports the view that the Medicaid lien on the medical benefits reimbursement is not reduced because Schluttenhofer's claim under that policy was paid in full.

. . . .

. . . [S]chluttenhofer had multiple "claims," one of which—his claim for $10,000 under the medical payments provision of the State Farm policy—was not reduced. That claim existed as a matter of contract law independent of his claims against the other parties, without regard to the negligence liability of any party, and was paid in full. Section 34-51-2-19 comes into play only when the recovery on a "claim" is diminished by comparative fault or uncollectibility of the claim's full value. It does not apply to the State Farm medical benefit because that claim was not diminished.

. . . The Court of Appeals stated that it "cannot find that it was the intent of our legislature to dissect a claimant's settlement, finding that certain monies should be applied while others are not." Schluttenhofer, 750 N.E.2d at 432. We agree that it is improper to attempt to allocate a portion of the funds paid to settle any or all of the liability claims to medical expenses, as opposed to pain and suffering or other items. But the statute requires that each claim be evaluated. To the extent any claim was diminished by comparative fault or uncollectibility, reduction of the lien is proper. Because there was no reduction of the State Farm claim, FSSA's lien is valued to the full amount of the claim against State Farm.

. . . .

SHEPARD, C. J., DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

MATTER OF TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF M. N., No. 17A03-0101-JV-8, ___ N.E.2d ___ (Ind. Ct. App. May 16, 2002).

NAJAM, J.

Mary Neal signed a Voluntary Relinquishment of Parental Rights form with respect to each of her two children, but later appeared in open court, repudiated her written consent, and expressed her desire to retain her parental rights. The trial court found that Neal's written consent was made voluntarily and terminated her parental rights. Neal appeals and presents a single dispositive issue for our review, namely, whether her voluntary written consent is invalid because it was not acknowledged in open court pursuant to Indiana Code Section 31-35-1-6(a).

We reverse. [Footnote omitted.]

. . . .

. . . We have previously addressed whether a parent can withdraw her written consent to the voluntary termination of parental rights, and we concluded that written consent is irrevocable, and, therefore, valid, unless it was induced by fraud. [Citations omitted.] In those cases, however, we relied on case law regarding consent to adoption and did not squarely address the statutory requirement that a parent's voluntary consent to the termination of parental rights be given in open court. [Citation omitted.] . . .

. . . .

In order for the court to accept a parent's voluntary consent to the termination of parental rights, Indiana Code Section 31-35-1-6(a) ("Section 6(a)") requires that:

> the parents must give their consent in open court unless the court makes findings of fact upon the record that:
>
> (1) the parents gave their consent in writing before a person authorized by law to take acknowledgments;
> (2) the parents were notified of the constitutional and other legal rights and of their actions under section 12 of this chapter; and
> (3) the parents failed to appear.

. . .

In addition, Indiana Code Section 31-35-1-12 ("Section 12") requires that the following information be given to parents who voluntarily terminate parental rights:

> For purposes of sections 6 and 8 of this chapter, the parents must be advised that:
>
> (1) their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress or unless the parent is incompetent; . . .
>
> (8) the parents will receive notice of the hearing at which the court will decide if their consent was voluntary and the parents may appear at the hearing and allege that the consent was not voluntary.

. . .

Neal contends that the plain language of Section 6(a) requires that a parent's voluntary consent to the termination of parental rights be given in open court, unless the exceptions set out in the statute are satisfied. The DFC, in turn, points out that Section 12 provides that a parent's consent "is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress or unless the parent is incompetent," and that a hearing will be held to determine the voluntariness of her consent. The DFC essentially maintains that these provisions of Section 12 trump the open court requirement set out in Section 6(a). We cannot agree.

Section 6(a) expressly requires that a parent's consent to the termination of her parental rights be made in open court unless all three of the listed exceptions apply. The issue is whether that section conflicts with Section 12, which states that consent cannot be revoked and that a hearing will be held to determine whether a parent's consent was voluntary. At first glance, Section 12 might appear inconsistent with Section 6(a) regarding whether consent can be revoked once it is given. But that inconsistency only exists if we equate "written consent" with "consent" for purposes of construing Section 12(1). [Footnote omitted.] In other words, the DFC reads the statute to mean that written consent can never be revoked. But, given the clear meaning of "consent" as set out in Section 6(a), and given that Section 12 specifically refers back to Section 6, it is plain that consent cannot be revoked once it is obtained pursuant to Section 6(a), which requires that written consent be acknowledged in open court or that all three exceptions are satisfied. In addition, once consent is obtained under Section 6(a), the court determines whether that consent was made voluntarily. Construed in this manner, the open court provision of Section 6(a) is consistent with both the irrevocability and voluntariness provisions of Section 12.

. . . .

In sum, we conclude that statutory construction of Indiana Code Sections 31-35-1-6 and -12 resolves the issue presented here. We adopt the reasoning in Justice Dickson's dissent to the denial of transfer in Ellis, 685 N.E.2d at 477, and Judge Rucker's (now Justice Rucker) reasoning in his dissent in J.W.W.R., 712 N.E.2d at 1086. We hold that under the Juvenile Code, a parent's written consent to the voluntary termination of her parental rights is invalid unless she appears in open court to acknowledge her consent to the termination, or unless all three of the exceptions set out in Indiana Code Section 31-35-1-6(a) are satisfied.

. . .

. . . .

BAKER and MATTINGLY-MAY, JJ., concurred.

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